

VERNER · LIPFERT
BERNHARD · McPHERSON & HAND
CHARTERED

ERIC THOMAS WERNER
(202) 371-6230

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

RECEIVED

FEB 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

February 26, 1996

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Definition of Markets for Purposes of the Cable Television Mandatory
Television Broadcast Signal Carriage Rules (CS Docket No. 95-178) --
Reply Comments of Blackstar of Ann Arbor, Inc.

Dear Mr. Secretary:

On behalf of Blackstar of Ann Arbor, Inc. ("Blackstar"), licensee of Station WBSX(TV), Channel 31, Ann Arbor, Michigan, and pursuant to Section 1.419 of the Commission's Rules, I enclose an original and nine (9) copies of Blackstar's Reply Comments in the above-referenced proceeding.

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,


Eric T. Werner

Enclosures

cc: Erwin G. Krasnow, Esquire

No. of Copies rec'd 029
List ABOVE

HOUSTON, TEXAS OFFICE
2600 TEXAS COMMERCE TOWER
600 TRAVIS
HOUSTON, TEXAS 77002
(713) 237-9034
FAX: (713) 237-1216

AUSTIN, TEXAS OFFICE
SAN JACINTO CENTER
98 SAN JACINTO BLVD., SUITE 1440
AUSTIN, TEXAS 78701
(512) 703-6000
FAX: (512) 703-6003

HONOLULU, HAWAII OFFICE
HAWAII TIMES BUILDING
928 NUUANU AVE., SUITE 400
HONOLULU, HAWAII 96817
(808) 566-0999
FAX: (808) 566-0995

MCLEAN, VIRGINIA OFFICE
8280 GREENBROOK DRIVE
SUITE 601
MCLEAN, VIRGINIA 22102
(703) 749-6000
FAX: (703) 749-6027

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

FEB 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Definition of Markets for)
Purposes of the Cable Television)
Mandatory Television Broadcast)
Signal Carriage Rules)

CS Docket No. 95-178

DOCKET FILE COPY ORIGINAL

To: The Commission

REPLY COMMENTS OF BLACKSTAR OF ANN ARBOR, INC.

Blackstar of Ann Arbor, Inc. ("Blackstar"), licensee of Station WBSX(TV), Channel 31, Ann Arbor, Michigan (the "Station"), by its attorneys and pursuant to Section 1.415 of the Communication's rules, hereby submits its Reply Comments in response to a *Notice of Proposed Rule Making* in the above-captioned proceeding.^{1/}

INTRODUCTION

In 1993, the Commission erected a regulatory scheme that struck a balance between the interests of broadcasters and cable operators. It afforded stability to cable operators by requiring broadcasters to elect between their must-carry rights or retransmission consent for a three-year period and determined that the Area of Dominant Influence ("ADI") designations that formed the context for these elections would likewise "be set for a three year period . . . to coincide with the . . . election time frame" *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2975 ¶ 38 (1993) [hereinafter "*Report and Order*"]; see also 47 U.S.C. §§

^{1/} *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, FCC 95-489 (released December 8, 1995) ("*Notice*").

325(b)(3), 614. On the other hand, the Commission provided that broadcasters would have the opportunity to reassess their elections at those three-year intervals based upon changes in the marketplace, including changes in audience viewing patterns reflected by updated ADI designations. The Commission's proposal to employ the 1991-92 Arbitron ADI designations for the approaching must-carry/retransmission consent election cycle would upset this balance and abandon without adequate explanation or justification the policy adopted by the Commission three years ago.

I. USE OF THE 1991-92 ARBITRON ADI DATA CONFLICTS WITH THE COMMISSION'S STATED POLICY FAVORING USE OF UPDATED MARKET INFORMATION AND IS INCONSISTENT WITH THE PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996

Blackstar fully agrees with those parties who criticize the Commission's proposal to retain the 1991-92 ADI designations as an unwarranted and irrational departure from the triennial review process adopted by the Commission in 1993.^{2/} As the Commission's rules and the *Notice* acknowledge, the triennial review process originally adopted by the Commission contemplated the use of updated, current market data for each must-carry/retransmission consent election. The *Notice* quotes the note to Section 76.55(e) of the Commission's rules:

For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the *1991-92 Television ADI Market Guide*, available from the Arbitron Rating Co. . . . will apply. ADI Assignments will be updated at three-year intervals. For the 1996 election period, the 1994-95 ADI list will be used; the applicable list for the 1999 election will be the 1997-98 list, etc.

Notice at 3 ¶ 4 (emphasis added).

^{2/} See Comments of The Association of Local Television Stations, Inc. at 3; Comments of SL Communications, Inc. at 3-4; Comments of Costa de Oro Television, Inc. at 3-4.

Indeed, when it adopted the foregoing policy, the Commission acknowledged that the recommendation of several commenters that the 1991-92 list of ADI county assignments "be frozen." *Report and Order*, 8 FCC Rcd at 2975 ¶ 38. Then, the Commission flatly rejected that proposal, stating that it believed that

a scheme whereby ADI designations will be set for a three-year period designed to coincide with the three-year election time frame for the must-carry/retransmission consent election . . . will allow us to take into account changing markets while at the same time providing stability for the affected parties.

Id. (emphasis added). Thus, the Commission found that updating the market data to reassess market definitions on a triennial was entirely compatible with maintaining market stability. No logical basis exists to justify reconsideration of that judgment now, let alone the Commission's proposed wholesale retreat from it. This is especially so given the fact that not even one subsequent must-carry/retransmission consent election cycle has passed since the policy was adopted and that, thus, no record exists to call the conclusion into question.

The Commission's stated intention to use the outdated Arbitron data is particularly curious in light of Congress's recent action in the Telecommunications Act of 1996. Among the sweeping provisions of that law, Congress expressly eliminated the statutory prescription that required the Commission to employ Arbitron ADI data when making market determinations for must-carry and retransmission consent purposes.

Specifically, the Telecommunications Act struck the reference to Section 73.3555(d)(3)(i) [now Section 73.3555(e)(3)(i)] that appeared in the original provision. Under the new law, a broadcasting station's market must be determined "by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns." § 301(d)(1)(A). Recognizing the problem

created by Arbitron's departure from the television market analysis scene, Congress liberated the Commission to employ alternative sources for the same information previously provided by Arbitron.

Moreover, the language used by Congress in the new provision evinces the intention that the FCC continue to base market determination decisions on current data that reflect market realities at the time the determination is made. Congress was aware of the Commission's stated intention to use the most recent market data available during each triennial must-carry/retransmission consent election cycle. With this in mind, Congress spoke in terms of present data rather than data from earlier periods: The statute requires the Commission to base market determinations upon publications which "delineate" (present tense) markets based on viewing patterns rather than those which "delineated" markets at some previous time based upon earlier viewing patterns. Had Congress intended that the Commission continue to utilize the old Arbitron data, it need not have changed the statute at all.

Reinforcing this point, Congress included the modifier, "where available," signalling (1) that Congress was aware that Arbitron had ceased publishing television market data (and thus was no longer available for use by the Commission); and (2) that Congress recognized that other, presently existing, television market analysis organizations might similarly leave the business in the future, thus making them unavailable for future market determinations. Had Congress intended that the FCC not update the market data on which it relies, but instead continue using outdated 1991-92 Arbitron data, the modifier, "where available," would have been entirely superfluous because such data would never be unavailable.

While the statute surely affords the FCC discretion to choose among commercially available television market surveys other than Nielsen, "where [such publications are] available,"^{3/} it does not permit the Commission to use old data which is neither commercially published at present nor delineates television markets based on current viewing patterns.

A number of cable television system operators and state cable television associations stated in their comments that this revision to the Communications Act "is entirely consistent with a continued reliance on Arbitron's existing ADI list." *See, e.g., Comments of Cole, Raywid & Braverman* at 2. In support of this assertion, they contend that had Congress intended the FCC to supplant Arbitron data with Nielsen Designated Market Area ("DMA") data it could have said so and Congress' silence on the point leaves the decision whether to continue using Arbitron data to the FCC's discretion. *Id.* at 3.

This interpretation misses the point of the amendment. Had Congress specified the use of Nielsen DMA data, it would have risked the recurrence of the very problem the Commission confronted in the *Notice, i.e.,* what to do in the event the statutorily specified ratings service went out of business or otherwise ceased publishing television market data. To avoid this potential pitfall, Congress placed the selection of the particular service within the agency's discretion, subject to the guidelines discussed above.

To suggest that by choosing not to specify a particular ratings service, Congress intended to allow the Commission to continue to use a service that no longer commercially

^{3/} Blackstar is aware of no such alternative publications. In any event, Nielsen's DMAs now constitute the *de facto* industry standard for market designations, and the Commission has accepted them as a suitable substitute for Arbitron's ADIs in other circumstances. *See Stockholders of CBS, Inc.*, FCC 95-469 (released November 22, 1995) at ¶ 69 n.24; *Media/Communications Partners Limited Partnership*, 19 FCC Rcd 8116, 8116 n.3 (1995).

publishes television market information based on viewing patterns stands the statute on its head. Such an interpretation conflicts with the statute's purpose and the congressional intent underlying it, and must therefore be rejected.

Arbitron's departure from the television market survey business, which provided the exigence for the instant rulemaking, would justify the continued use of the 1991-92 market designation list (Arbitron's most current publication) and the reversal of the policy articulated in the note to Section 76.55(e) of the Commission's rules only if the Commission were still subject to a statutory obligation to use Arbitron ADI data. As this is demonstrably no longer the case, the Commission has no rational basis upon which to depart from its determination to use updated, current market information for the upcoming triennial election cycle.^{4/}

II. CONTINUED USE OF THE 1991-92 ARBITRON ADI DATA WOULD UNFAIRLY DENY THE STATION THE OPPORTUNITY TO EFFECT A CORRECTION IN ITS ADI DESIGNATION THAT EVEN ARBITRON RECOGNIZED

In reevaluating its proposal to set in stone the 1991-92 Arbitron market designations, the Commission should consider the impact that decision will have on stations that acted in reliance on the Commission's statement that ADIs would be updated and revised on the three-year cycle coinciding with the must-carry election.

Channel 31 went on the air in January 1981 as an STV operation and was listed by both Arbitron and Nielsen as home to the Detroit television market. With a subscription format, the ADI or DMA was not relevant. Late in 1985, the STV business was failing and Satellite Television Systems, Inc., then the licensee of Channel 31, chose to convert the STV

^{4/} As ALTV's Comments correctly contend, common sense and the Commission's own past decisions reflect that Nielsen DMAs constitute an equivalent substitute for Arbitron's ADIs. Comments of The Association of Local Television Stations, Inc. at 6-10. Accordingly, the inconsequential differences between the two schemes do not provide an adequate justification for such a fundamental retreat from the FCC's policy favoring use of updated data.

operations to a general format independent station. Shortly after this conversion, the Station was approached by a representative of Arbitron seeking to have the Station subscribe to its television audience rating service who suggested that the Station be reported as part of the Lansing market as the audience would be more likely to reach the minimum reporting standards required to "make the book". The intention was that this arrangement would be temporary and that the Station would eventually be listed in the Detroit ADI as its true home market. Nielsen also agreed.

In the fall of 1987, the Station became affiliated with Home Shopping Network on a full-time basis. With this format, the market designation of the Station was, again, not relevant to its success. Indeed, at the time the Station began broadcasting Home Shopping programming, the relationship with the Arbitron Company was ended as the Station no longer had a need for audience measurement.

The passage of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") changed the basis for must carry from 35 miles to the ADI of the Station. With a Home Shopping format, Blackstar, the new licensee of the Station, had no need to request that the ratings services return to the Station's "home" market of Detroit. This caused us considerable hardship during the must carry election process and resulted in the Station being denied carriage on a number of large cable systems in the market. At Blackstar's request, both Nielsen and Arbitron agreed to return WBSX to the Detroit market. As shown in the letter from Arbitron, attached as Exhibit A, the decision was based on the fact that WBSX's home county (Washtenaw County) and its city of license (Ann Arbor) are located within the Detroit ADI and DMA. As evidence of Blackstar's commitment to the Detroit television market, Blackstar has acquired LPTV Station W48AV, Detroit, and has

converted the low power television station to a translator station which rebroadcasts the signal of WBSX.

Unfortunately, the 1991-92 Arbitron publication used by the Commission did not reflect the station's relocation by the ratings services which happened in 1993. Blackstar remained confident, however, in the knowledge that the Commission would give effect to the new ADI designation in the 1996 must-carry election cycle. The Commission's proposal to continue to use of the outdated 1991-92 publication represents a repudiation by the Commission of a policy on which Blackstar reasonably relied: It will result in further substantial damage to the Station, damage which is entirely unnecessary and unwarranted in light of the change in the statute effected by the Telecommunications Act.

Moreover, seeking relief through the Section 614(h) modification procedure would place an extraordinary burden on the Station: The Detroit ADI/DMA (to which both Arbitron and Nielsen now assign the Station) contains some 38 communities within which the Station could assert must-carry rights. Continued use of the 1991-92 Arbitron data, however, with recourse only to Section 614(h) process, would require the Station to present the requisite modification showing with respect to each of these communities on an individual basis, a process that is neither cost-effective nor otherwise efficient either for the Station or the Commission. Under these circumstances, it would be entirely unfair and inequitable to impose such a burden on the Station.

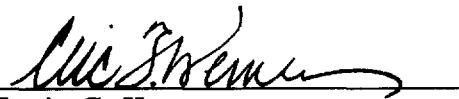
CONCLUSION

In the absence of a statutory requirement that Arbitron ADI data be employed for must-carry market determinations, continued use of the 1991-92 ADI data would constitute an irrational departure from the Commission's announced policy that it would use updated

market information for each successive must-carry/retransmission consent election period and is contrary to the intent of the Section 301(d)(1)(A) of the Telecommunications Act. In light of the relative equality of Arbitron's ADIs and Nielsen's DMAs as recognized by the FCC's own decisions, Blackstar urges the Commission to adopt the current DMA designations for the upcoming election cycle as the most logical and reasonable alternative now that current Arbitron information is not "available."

Respectfully submitted,

BLACKSTAR OF ANN ARBOR, INC.

By: 
Erwin G. Krasnow
Eric T. Werner
VERNER, LIIPFERT, BERNHARD
MCIPHERSON AND HAND
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(202) 371-6000

Its Attorneys

February 26, 1996

James E. Mocarski
Midwestern Vice President
Television Station Services

May 17, 1993

Mr. Christopher J. Webb
Vice President/General Manager
WBSX-TV
3975 Varsity Drive
Ann Arbor, MI 48108

Chris:

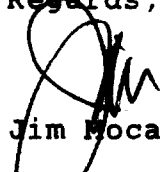
Thanks for the reminder call on my March 30 letter. I sent your request to our policy people and didn't make a note to follow-up with them.

Effective with the 1993/1994 broadcast year, we will treat WBSX as a home station to the Detroit ADI.

This decision is based on your request to do so and is allowed because your home county (city of license location) is within the Detroit ADI.

Please let me know if you have any questions.

Regards,



Jim Mocarski
JM/wvj